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11 Attorneys for Plaintiffs
12 ORACLE AMERICA, INC. and
13 ORACLE INTERNATIONAL CORPORATION

14
15 UNITED STATES DISTRICT COURT
16 NORTHERN DISTRICT OF CALIFORNIA
17 SAN FRANCISO DIVISION

18 ORACLE AMERICA, INC., a Delaware
19 corporation and ORACLE INTERNATIONAL
20 CORPORATION, a California corporation,

21 Plaintiffs,
22 v.
23

24 NEC CORPORATION OF AMERICA, a
25 Nevada corporation,
26

27 Defendant.

28 Case No. 21-cv-05270-CRB

**DECLARATION OF DENNIS CARTEY
IN SUPPORT OF PLAINTIFFS'
MOTION TO: (1) DISMISS
COUNTERCLAIMS PURSUANT TO
RULE 12(B)(6), AND (2) STRIKE
AFFIRMATIVE DEFENSES
PURSUANT TO RULE 12(F)**

Judge: Hon. Charles R. Breyer

I, Dennis Cartey, declare as follows:

1. I am a Deal Specialist at Oracle America, Inc. (“Oracle”), one of the plaintiffs in the above-referenced case. I have served as a Deal Specialist at Oracle since November 2016. Except where otherwise stated, I have personal knowledge of the facts included in this declaration and could, if called upon to do so, testify competently to them.

2. As a Deal Specialist at Oracle, I have been responsible for executing certain agreements on Oracle's behalf.

3. In March 2017, I signed – on Oracle’s behalf – an Embedded Software License Distribution Addendum agreement between Oracle and NEC Corporation of America (“NECAM”), entitled “EMBEDDED SOFTWARE LICENSE DISTRIBUTION ADDENDUM to the ORACLE PARTNERNETWORK ISV MASTER DISTRIBUTION AGREEMENT Between NEC CORPORATION OF AMERICA and ORACLE AMERICA, INC.,” with an effective date of March 8, 2017 (“the Embedded License”). Attached as **Exhibit A** is a true and correct copy of the Embedded License.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed on September 22, 2021, in San Antonio, Texas.

Dennis Cartey

Dennis Cartey

Exhibit A



EMBEDDED SOFTWARE LICENSE DISTRIBUTION ADDENDUM
to the
ORACLE PARTNERNETWORK
ISV MASTER DISTRIBUTION AGREEMENT
Between
NEC CORPORATION OF AMERICA
and
ORACLE AMERICA, INC.

This Embedded Software License Distribution Addendum (the "addendum") is between Oracle America, Inc. ("Oracle") and NEC Corporation of America ("you") and shall be governed by the terms of the Oracle PartnerNetwork ISV Master Distribution Agreement (US-OPN-MA-ISV-12514010-11-DEC-2013) between Oracle and you dated December 11, 2013 (the "agreement") and the terms set forth below. Definitions used in the agreement shall have the same meaning under this addendum, unless expressly stated otherwise. If there is a direct conflict between a term of this addendum and a term of the agreement, the term of this addendum shall prevail.

1. Agreement Definitions

For purposes of this addendum, insert the following new definitions at the end of section A of the agreement, Agreement Definitions:

The term "application package" refers to your application program into which the programs are embedded, and that is distributed to an end user. You must complete a separate application package registration form for each application package.

The term "application program" refers to an application program or physical device developed by you and specified in the applicable application package registration form which is developed to run on the programs and complies with the following requirements: (1) the application program or physical device must be generally commercially available to commercial customers; (2) the application program or physical device must be accompanied by end user documentation; and (3) the application program or physical device must be commercially available to multiple end users and must not be intended for the exclusive use of a specific end user or group.

The term "distribution rights" refers to the right to distribute the programs to an end user embedded with the application package defined in an application package registration form in accordance with the terms of this addendum and the agreement.

The term "embedded" refers to the following requirements, with which the application package must comply:

- (i) The programs must be packaged, installed, and configured as an integrated component on the application program's product media or set of media. When loading the software, the application software must launch the programs silently. If the Oracle Universal Installer (OUI) is available as an installer for one or more of the programs then those programs must be installed by the OUI in silent mode. The application package must include pre-set configurations for the programs you are embedding. The end user must not be permitted to install or configure the programs separately and independently from the application package;
- (ii) The application program must be designed and developed by you to eliminate program administration tasks by the end user by including all program administration functions within the application program. You may not customize the application package for a single end user or a group of end users. All administration scripts including startup, shutdown, and backup are to be provided by you within the application program. The end user must not be permitted to access the programs directly but rather only through the application program;
- (iii) All information from the programs must be accessed by the end user either through prepackaged reports, or ad hoc reports that are developed by you, and included in the application package, which do not require or permit the

end user to navigate the underlying data schema. If you include Oracle or third party reporting tools in the application package, such tools must be embedded in the application package pursuant to the terms of this agreement;

(iv) If the application package must interface with another application or database, the end user is not permitted to directly access the database or use Oracle-supplied APIs to establish the transfer of data. To transfer data, you must set up predefined APIs unique to the application package and management of the data transfer must be done through the application program;

(v) If you include Oracle or third party database tools in the application package, such tools must be embedded in the application package pursuant to the terms of this agreement. The end user may not be permitted to use such tools to access the programs directly, rather all access must be provided by you within the application program;

(vi) Program upgrades must be certified and distributed as a component of the application package and the end user shall be unable to upgrade the database or other Oracle program technology versions as a separate component;

(vii) As you deem necessary, you will provide customer service, support, and education for all program operations to the end user. If you discontinue providing customer service, support, or education for your application package to the end user, Oracle will not be obligated to provide ongoing service, support, or education to the end user. You will notify Oracle of your intention to discontinue any support services provided by you to the end user;

(viii) Only you can access the programs directly for purposes of technical assistance to your end user and such access is limited to providing technical assistance, including troubleshooting, problem resolution, and support assistance. You shall not provide remote or onsite program administration tasks on behalf of the end user that are otherwise prohibited under the terms of this agreement;

(ix) The embedded programs and the application program must be priced together on your standard price list and on the end user's invoice as the price of the application package, and must not be distributed separately; and

(x) The application program(s) described on the applicable application package registration form and with which the programs are embedded must not be distributed under any other Oracle distribution agreement.

The term "end user license agreement" refers to a legally binding written agreement as further described in Section 6 (License Agreement).

For the purposes of this addendum, the term "programs" refers to the software products owned or distributed by Oracle (including program documentation and any program updates acquired through technical support) that are set forth on the Oracle Embedded Product and Royalty Matrix and specified on the application package registration form. The term "programs" does not include any Oracle programs which are not included on the Oracle Embedded Product and Royalty Matrix. You may access the Oracle Embedded Product and Royalty Matrix at <http://partner.oracle.com> (log in, select Membership / Agreements & Policies).

2. Distribution Rights

Subject to the terms of the agreement, Oracle grants you a nonexclusive, nontransferable right to (a) duplicate the programs for which you have received a development license under an Oracle PartnerNetwork Agreement between you and Oracle and (b) distribute such programs to end users as part of the application package. The programs must be embedded with your application program and distributed with your application program and cannot be provided separately. Prior to distributing programs, you must obtain an order from the end user for the programs, which order and programs shall be subject to a valid end user license agreement. Each distributed embedded program must be used only for the internal business operations of the end user and must be used only in conjunction with the application package. Each distributed embedded program shall be subject to the terms of this addendum and the agreement and the terms provided in the end user license agreement. You may distribute the application package to yourself or your affiliated entities and you and any such entity shall be considered an end user under this addendum and the agreement provided that: (1) you comply with the requirements of Section 6 (License Agreement), and (2) you report such distribution in accordance with Section 5 (Reporting). You may not distribute the programs, learning credits, and/or services to end users that are public sector entities. The total fees paid to Oracle for distribution of the application package to you and any affiliated entities may not exceed 20% of the total fees paid to Oracle under this addendum. Oracle may disclose

information about the rights granted to you pursuant to this addendum and the agreement to an Oracle Value Added Distributor ("Oracle VAD").

3. Trial Licenses

Oracle grants you a nonexclusive right for you and your distributors to distribute trial licenses of the application package to no more than 50 end users, at any one time, for the end users' own internal evaluation purposes (and not for development, prototype, training or technical support purposes) pursuant to section 6 (License Agreement) below. Trial licenses shall be for 30 days and shall be subject to the terms of this addendum and the agreement and the terms provided in the order. If your end users want to use a trial license for more than 30 days, then they must obtain an appropriate license and pay the appropriate fees. You must pay Oracle a fee for any trial licenses that you distribute that extend for more than 30 days. Programs licensed for trial purposes are provided "as is" and Oracle does not provide technical support or any warranties for these programs.

4. Distributors

You may appoint distributors to distribute the programs embedded with your application package as provided under the terms of this addendum and the agreement. Distributors have no right to make copies of the programs and shall obtain all programs from you. Each distributor must be subject to a legally binding written agreement between you and the distributor that (a) grants the rights for the distributor to distribute the application package to end users, (b) contains or incorporates provisions which are equivalent to the terms of this addendum and the agreement, and (c) permits you to audit your distributors' activities under such agreement and report such activities to Oracle or assign your right to audit the distributors' activities to Oracle. In addition, the agreement with your distributors shall require the distributors to distribute the application package subject to terms that are consistent with the terms of this addendum and the agreement. Any distribution of the application package by your distributors shall be subject to an end user license agreement between you and the end user as set forth in Section 6 (License Agreement) of this agreement. You shall keep executed distributor agreements for Oracle to inspect upon request. You agree to conduct appropriate due diligence to ensure the compliance of your distributors with all laws applicable to ethical business practices, the guidance for which can be found in section M of the agreement and in the Oracle Partner Code of Conduct and Business Ethics. You shall defend and indemnify Oracle from all claims and for all damages arising out of the activities of your distributors.

You shall be financially responsible for all claims and damages to Oracle caused by your failure to include the required contractual terms set forth above in each agreement between you and a distributor. You agree to inform Oracle promptly if you are aware of any breach of a distributor agreement. You agree to enforce the terms of a distributor agreement between you and a distributor if Oracle requests you to do so to protect its interest, or, at Oracle's request, to assign to Oracle or its designee the right to enforce such agreement.

5. Reporting

In connection with your distribution activities under this addendum and the agreement, you shall submit monthly reports for programs distributed with the application package to Oracle in accordance with the Partner Ordering Policy. You should review the Partner Ordering Policy prior to submitting a report. Your monthly report must be complete when submitted to Oracle and may not (a) require any concessions (including requiring Oracle to perform any obligations or to incur any liability not set forth in your monthly report or this addendum and the agreement) or (b) be changed after it is submitted to Oracle.

6. License Agreement

It is your responsibility to ensure that any distribution of the programs and/or services to an end user is subject to a legally binding end user license agreement. The end user license agreement must, at a minimum:

- (1) limit the use of the programs to the legal entity that executed the end user license agreement.
- (2) restrict use of the programs to the scope of the application package and to the internal business operations of the end user. You may allow your end users to permit agents or contractors (including, without limitation, outsourcers) to use the application package on the applicable end user's behalf for the end user's internal business operations as described above, subject to the terms of the end user license agreement. For an application package that includes programs that are specifically designed to facilitate interactions between the end user and the end user's customers and suppliers, you may allow the end user to permit its customers and suppliers to use the application package in furtherance of such interactions subject to the end user license agreement. The end user license agreement shall require the end user to be responsible for its agent's, contractor's, outsourcer's, customer's and supplier's use of the application package and compliance with the end user license agreement.

- user license agreement.
- (3) state that Oracle or its licensor retains all ownership and intellectual property rights to the programs.
 - (4) prohibit (a) the transfer of the programs except for temporary transfer in the event of computer malfunction if the application package embeds the programs in a physical device and (b) the end user from assigning, giving, or transferring the programs and/or any services ordered or an interest in them to another individual or entity (in the event the end user grants a security interest in the programs and/or any services, the secured party has no right to use or transfer the programs and/or any services).
 - (5) prohibit (a) use of the programs for rental, timesharing, subscription service, hosting, or outsourcing; (b) the removal or modification of any program markings or any notice of Oracle's or its licensors' proprietary rights; (c) the end user from making the programs available in any manner to any third party for use in the third party's business operations (unless such access is expressly permitted for the specific program license); and (d) title to the programs from passing to the end user or any other party.
 - (6) prohibit the reverse engineering (unless required by law for interoperability), disassembly or decompilation of the programs (the foregoing prohibition includes but is not limited to review of data structures or similar materials produced by programs) and prohibit duplication of the programs except for a sufficient number of copies of each program for the end user's licensed use and one copy of each program media.
 - (7) disclaim, to the extent permitted by applicable law, Oracle's liability for (a) any damages, whether direct, indirect, incidental, special, punitive or consequential, and (b) any loss of profits, revenue, data or data use, arising from the use of the programs.
 - (8) require the end user, at the termination of the agreement, to discontinue use and destroy or return to you all copies of the programs and documentation.
 - (9) prohibit publication of any results of benchmark tests run on the programs.
 - (10) require the end user to comply fully with all relevant export laws and regulations of the United States and other applicable export and import laws to assure that neither the programs, nor any direct product thereof, are exported, directly or indirectly, in violation of applicable laws.
 - (11) notify the end user that the programs are subject to a restricted license and can only be used in conjunction with the application package and that the end user is not permitted to modify the programs.
 - (12) not require Oracle to perform any obligations or incur any liability not previously agreed to between you and Oracle.
 - (13) permit you to audit your end user's use of the programs, require the end user to provide reasonable assistance and access to information in the course of such audit and permit you to report the audit results to Oracle or to assign your right to audit the end user's use of the programs to Oracle. Where you assign your right to audit to Oracle then Oracle shall not be responsible for any of your or the end user's costs incurred in cooperating with the audit.
 - (14) designate Oracle as a third party beneficiary of the end user license agreement.
 - (15) exclude the application of the Uniform Computer Information Transactions Act.
 - (16) inform the end user that some programs may include source code that Oracle may provide as part of its standard shipment of such programs, which source code shall be governed by the terms of the end user license agreement.
 - (17) state that third party technology that may be appropriate or necessary for use with some Oracle programs is specified in the application package documentation or as otherwise notified by you and that such third party technology is licensed to the end user only for use with the application package under the terms of the third party license agreement specified in the application package documentation or as otherwise notified by you and not under the terms of the end user license agreement.

You shall be financially responsible for all claims and damages to Oracle caused by your failure to include the required contractual terms set forth above in each end user license agreement between you and an end user. Oracle is a third party beneficiary of any end user license agreement between you and the end user, but does not assume any of your obligations thereunder, and you agree that you will not enter into any end user license agreement that excludes Oracle as a third party beneficiary.

You agree to inform Oracle promptly if you are aware of any breach of an end user license agreement. You agree to enforce the terms of an end user license agreement between you and an end user if Oracle requests you to do so to protect its interest, or, at Oracle's request, to assign to Oracle or its designee the right to enforce such agreement.

7. Fees and Taxes

You may place an order or submit a monthly report for programs and/or services with Oracle. You agree to pay Oracle a fee for each order placed for programs and/or services ordered and/or distributed under this addendum and the agreement, as specified in the applicable order with Oracle and/or report. You also agree to pay Oracle a fee for every application package with which the programs are embedded regardless of an end users prior possession or pre-existing license of these programs unless you are shipping only an updated version of the application package as part of your technical support service for which you are paying technical support fees to Oracle as specified herein. At your option, fees payable to Oracle for programs distributed to end users with the application package will be equal to either (a) the applicable license fee for each individual program based on the Oracle Embedded Product and Royalty Matrix in effect at the time you issue a quote or (b) the percentage shown in Oracle's Embedded Product and Royalty Matrix of the applicable standard license fee for the application package based on your standard commercial price list in effect at the time you issue a quote, incorporated in this addendum and the agreement, and such fees owed to Oracle will not take into account any discounts you have offered to your end users.

In addition, with regard to fees for technical support you provide to end users for perpetual or term licenses of the programs, you agree to pay Oracle a technical support fee as set forth in the Oracle Embedded Product and Royalty Matrix. Technical support may be available to the end user on the date you ship the application package, or the date you distribute the application package to the end user, if shipment is not required. If technical support is provided by you to an end user, you must pay technical support fees to Oracle and the term for which you must pay fees to Oracle for such technical support shall begin on the last day of the month in which the application package is shipped, or distributed if shipment is not required, and if renewed, on that date in each subsequent year thereafter. If the end user does not continuously maintain technical support for the application package, you will be required to pay reinstatement fees to Oracle in accordance with Oracle's current technical support policies if the end user wants to reinstate technical support. Fees for technical support are due and payable annually in advance.

You must select one of the above fee options for each application package by completing the Application Package Registration Form attached hereto and your selection will be in effect for the term of this addendum. If you select option (a), to view the Oracle Embedded Product and Royalty Matrix, you must log into the OPN web site at <http://partner.oracle.com> (log in, select Membership / Agreements & Policies). It is your responsibility to access the Oracle Embedded Product and Royalty Matrix to obtain current information. If you select option (a), and Oracle's Embedded Product and Royalty Matrix changes after you issue a valid written quote for program licenses to an end user, then, for 90 days after the date you submit the quote to the end user, the fee applicable to the programs identified in the quote shall be based on the Oracle Embedded Product and Royalty Matrix in effect on the date you submitted the quote to the end user. If you select option (b), you will provide Oracle with a copy of your current standard commercial application package price list at least twice a year so that Oracle may verify the fees due and payable to Oracle.

Except as provided herein, all fees payable to Oracle (including fees for annual technical support which you provide to end users) are due within 20 days of the last day of the month in which the application package is distributed to the end user. If you submit a purchase order to Oracle, fees payable under such purchase order are due within 30 days of the date of the purchase order.

8. Warranties, Disclaimers and Exclusive Remedies

Oracle warrants to you that a program will operate in all material respects as described in the applicable program documentation for one year from delivery (i.e. via physical shipment or electronic download) to the end user. You must notify Oracle of any program warranty deficiency within one year from such delivery. Oracle also warrants that services will be provided in a professional manner consistent with industry standards. You must notify Oracle of any services warranty deficiencies within 90 days from performance of the defective services described in the order with Oracle.

ORACLE DOES NOT GUARANTEE THAT THE PROGRAMS WILL PERFORM ERROR-FREE OR UNINTERRUPTED, OR THAT ORACLE WILL CORRECT ALL PROGRAM ERRORS.

FOR ANY BREACH OF THE ABOVE WARRANTIES, YOUR EXCLUSIVE REMEDY AND ORACLE'S ENTIRE LIABILITY SHALL BE: (A) THE CORRECTION OF PROGRAM ERRORS THAT CAUSE BREACH OF THE WARRANTY; OR, IF ORACLE CANNOT SUBSTANTIALLY CORRECT SUCH BREACH IN A COMMERCIALLY REASONABLE MANNER, YOU MAY END YOUR PROGRAM LICENSE AND RECOVER THE FEES PAID TO

ORACLE FOR THE PROGRAM LICENSE AND ANY UNUSED, PREPAID TECHNICAL SUPPORT FEES YOU HAVE PAID FOR THE PROGRAM LICENSE; OR (B) THE REPERFORMANCE OF THE DEFICIENT SERVICES; OR, IF ORACLE CANNOT SUBSTANTIALLY CORRECT A BREACH IN A COMMERCIALLY REASONABLE MANNER, YOU MAY END THOSE SERVICES AND RECOVER THE FEES PAID TO ORACLE FOR THOSE SERVICES.

TO THE EXTENT PERMITTED BY LAW, THESE WARRANTIES ARE EXCLUSIVE AND THERE ARE NO OTHER EXPRESS OR IMPLIED WARRANTIES OR CONDITIONS INCLUDING WARRANTIES OR CONDITIONS OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

9. End User Technical Support

You are responsible for providing all technical support services and updates to distributors and end users. Any technical support questions Oracle receives from end users will be referred to you. You shall have the right to provide technical support for the programs to end users, including you or your affiliated entities if you have distributed the application package to you or such entities, provided (a) that you continually maintain your membership in the Oracle PartnerNetwork and maintain annual technical support for the development licenses that you acquire pursuant to your Oracle PartnerNetwork Agreement with Oracle and (b) subject to your payment to Oracle of the applicable annual fees for end user technical support set forth in Section 7 (Fees and Taxes) above. If you contract to provide or provide technical support services to an end user for an application package, including but not limited to providing any updates to the programs, then you must report such services to Oracle in accordance with Section 5 (Reporting) above and pay the applicable end user technical support fee. Technical support is effective upon shipment or delivery by you to the end user, or if shipment or delivery is not required, upon the effective date of the order with Oracle, unless otherwise stated in your order with Oracle. If your order was placed through the Oracle Store or other online ordering system, the effective date is the date your order was accepted by Oracle.

Upon expiration of this addendum and/or the agreement, you may continue to provide technical support to end users provided that (a) this addendum and/or the agreement was not terminated due to your breach of a material term of this addendum or the agreement; (b) you continuously maintain your membership in the Oracle PartnerNetwork and thereby maintain technical support for the development licenses that you acquired pursuant to your Oracle PartnerNetwork Agreement with Oracle; and (c) you pay all applicable fees and comply with the reporting requirements set forth in this addendum and/or the agreement. After expiration of this addendum and/or the agreement, renewal fees for end user technical support shall be invoiced by Oracle annually in advance. Fees for technical support shall be due and payable in advance thirty (30) days from date of invoice.

Annual technical support is provided under Oracle's technical support policies in effect at the time the services are provided. The technical support policies, incorporated in this addendum and/or the agreement, are subject to change at Oracle's discretion; however, Oracle will not materially reduce the level of services provided for supported program licenses during the period for which fees for technical support have been paid. You should review the policies prior to entering into the order for the applicable services. You may access the current version of the technical support policies at <http://partner.oracle.com> (log in, select Membership / Agreements & Policies).

You or your distributor will be responsible for any assistance needed to install the application package at end user sites. In addition to technical support (as discussed above), you are responsible for providing all training and consultations to distributors and end users and any related questions Oracle receives from end users will be referred to you.

10. Term and End of Agreement

This addendum shall begin on the effective date specified herein unless you accept the terms of this addendum online, in which case the effective date shall be as set forth in an email from Oracle confirming Oracle's acceptance of this addendum. The term of this addendum shall expire when the agreement expires or is terminated.

SIGNATURE PAGE FOLLOWS

The effective date of this Addendum shall be 08-MAR-2017 *[to be completed by Oracle]*

PARTNER: **NEC Corporation of America**

PARTNER ADDRESS: 3929 W John Carpenter Freeway
Irving, TX 75063

PARTNER FAX NO.: _____

Authorized Signature: Carl P. Layden

Name: Carl P. Layden
Title: Manager Soln Engineering

Signature Date: 3/07/17

Agreement No.: US-OPN-MA-ISV-ESL-
12514010- 08-MAR-2017

Oracle America, Inc.

Authorized Signature: Dennis Cartey

Name: Dennis Cartey
Title: Deal Specialist

Signature Date: Mar 8, 2017

[to be completed by Oracle]